THO YOW PEW & ANOR

v.

CHUA KOOI HEAN

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: W-02-156-2001]
13 JUNE 2002

SUCCESSION: *Probate - Testamentary capacity - Suspicious circumstances - Whether 'suspicious circumstances' relevant to testamentary capacity of testator - Whether 'suspicious circumstances' only relevant to making (preparation and execution) of will*

SUCCESSION: *Will - Testamentary capacity - Suspicious circumstances - Whether 'suspicious circumstances' relevant to testamentary capacity of testator - Whether 'suspicious circumstances' only relevant to making (preparation and execution) of will*

By his last will and testament, the testator devised and bequeathed a 60:20:20 percent share in the half-share he owned in a house in Kuala Lumpur to his mother, daughter and son respectively and the residue of his estate to his sister. The testator's wife ('the defendant') was bequeathed RM1 while the testator's two brothers ('the plaintiffs') were appointed as the executors and trustees of his estate. Upon the testator's demise, the plaintiffs applied for a grant of probate whilst the defendant entered a caveat at the probate registry. Thereafter, the plaintiffs took out a writ to propound the will to have it declared valid and the defendant counterclaimed for a declaration against the validity of the will. The trial judge dismissed the plaintiffs' claim and allowed the defendant's counterclaim on the grounds that the testator lacked the essential testamentary capacity and that there were suspicious circumstances relating to the testamentary capacity of the testator.

Held:
Per Gopal Sri Ram JCA

[1] 'Suspicious circumstances', in the context of wills, refer to the circumstances surrounding the **making** of a will and **not** the circumstances pertaining to the testamentary capacity of the testator. The trial judge had, therefore, erred both in principle and on authority when he proceeded to consider 'suspicious circumstances' in relation to the testamentary capacity of the testator. This was a misdirection of law. (pp 96 e, g-h & 97 c-d)

[2] The trial judge had also failed to consider certain evidence adduced by the defendant which was highly relevant to the question whether there were indeed suspicious circumstances surrounding the making of the testator's will. (p 97 f)

Per curiam

[1] Decided cases show that very slight testamentary capacity is required for the making of a will, and that to vitiate testamentary capacity the law requires an 'insane delusion' existing at the time of the making of the will. The mere fact that a testator was unwell when he executed his will scarcely means that he had no testamentary capacity. (pp 93 h, 94 a-b, h & 95 c-d)

[Plaintiff's appeal allowed; retrial before another judge ordered; costs to follow event of retrial.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Melalui wasiat terakhirnya pewasiat mewasiatkan separuh bahagian dari sebuah rumah di Kuala Lumpur yang dimilikinya kepada ibu, anak perempuan dan anak lelakinya masing-masing pada kadar 60:20:20 bahagian, dan baki pesaka kepada adik perempuannya. Isteri pewasiat ('defendan') telah diberi RM1 sementara dua adik beradik pewasiat ('plaintif-plaintif') dilantik sebagai wasi dan pemegang amanah pesakanya. Sewaktu kematian pewasiat, plaintif-palintif telah memohon untuk geran probet manakala defendan memfail kaveat di pejabat pendaftaran probet. Berikutnya, plaintif-plaintif memfailkan writ bagi mengisytiharkan wasiat sebagai sah dan defendan menuntut balas bagi suatu perisytiharan sebaliknya. Hakim perbicaraan menolak tuntutan plaintif-plaintif dan membenarkan tuntutan balas defendan atas alasan bahawa pewasiat tiada keupayaan untuk berwasiat dan bahawa wujud halkeadaan syakwasangka terhadap keupayaan pewasiat untuk berwasiat.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] 'Halkeadaan syakwasangka', dalam konteks pewasiatan, merujuk kepada halkeadaan yang membabitkan pembuatan sesuatu wasiat dan bukan kapasiti pewasiat untuk berwasiat. Hakim perbicaraan, dengan itu, telah khilaf dari segi prinsip dan autoriti bilamana beliau menimbang halkeadaan syakwasangka dalam hubungannya dengan keupayaan pewasiat untuk berwasiat. Ianya merupakan satu salah arahan undang-undang.

[2] Hakim perbicaraan juga gagal menimbang beberapa keterangan yang dikemukakan oleh defendan, keterangan mana adalah sangat relevan kepada persoalan sama ada halkeadaan syakwasangka sebenarnya wujud dan mempengaruhi pembuatan wasiat oleh pewasiat.

Per curiam:

[1] Kes-kes yang diputuskan menunjukkan bahawa pembuatan wasiat memerlukan hanya sedikit keupayaan untuk berwasiat, dan untuk memudaratkan keupayaan berwasiat perlulah wujud 'delusi gila' semasa wasiat dibuat. Menunjukkan semata-mata bahawa pewasiat tidak sihat sewaktu membuat wasiat tidak bermakna bahawa beliau tiada keupayaan untuk berwasiat.

Rayuan plaintif-plaintif dibenarkan; perbicaraan semula di hadapan hakim yang lain; kos berdasarkan peristiwa di perbicaraan semula.]

Case(s) referred to:
Henry Waring v. Thomas Waring 13 ER 342 ***(refd)***
Judah v. Isolyne Bose [1945] AIR PC 174 ***(foll)***
Sarat Kumari Bibi v. Rai Sakhi Chand [1929] AIR PC 45 ***(refd)***
Wintle v. Nye [1959] 1 All ER 552 ***(refd)***

Other source(s) referred to:
Theobald on Wills, 15th edn, pp 31, 36
Williams on Wills, 7th edn, pp 35, 36, 39

For the appellants - Karin Lim (A Suppiah); M/s Presgrave & Matthews
For the respondent - Joy Appukuttan (David Lee); M/s SK Yeoh & Partners

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S2-22-474-1997]

Reported by Gan Peng Chiang

JUDGMENT

(oral)

Gopal Sri Ram JCA (delivering the judgment of the court):
As long ago as 20 October 1995, Dr. Tho Yow Cheong made his last will and testament. In it he bequeathed RM1 to his wife and devised a 60%, 20% and a further 20% share to his mother, his daughter and his son respectively in the half-share owned by him in the property known as No. 27, Lorong Batai, Damansara Heights, Kuala Lumpur. He then devised and bequeathed the residue of his estate to his sister. By the same said will Dr. Tho, whom we shall for convenience refer to as the "testator", appointed his two brothers as

his executors and trustees of his estate. In June 1997, the executors and trustees applied for grant of probate. The testator's wife was unhappy with the will. She challenged it. She entered a caveat in the probate registry.

Later, the executors and trustees as plaintiffs took out a writ to propound the will to have it declared valid. The wife was cited as the defendant in those proceedings. She counter-claimed for a pronouncement against the validity of the will. Subsequently, the action was tried. Witnesses were called on both sides and the learned judge in a reserved judgment dismissed the executors' claim and granted the relief sought by the defendant in her counter-claim.

The principal ground on which the learned judge granted the counterclaim related to the testamentary capacity of the testator. He held on the basis of the evidence before him that the testator lacked the required testamentary capacity. He also held that there were suspicious circumstances relating to the testamentary capacity of the testator.

The brief facts of the case are that in 1984, the testator was diagnosed as having nasopharyngeal carcinoma (nose cancer). He became quite ill. He sought and received treatment. He administered unto himself several drugs to alleviate the headache he was suffering. He was obviously in excruciating pain. At about the time when he was undergoing treatment, it appears that he became estranged from his wife, the respondent. He left the matrimonial home, which is the subject matter of the gift we referred to earlier. He went to stay with his mother and his younger brother. He presented a petition for divorce. There is some correspondence from him about the unhappy state of his marriage. On 20 October 1995 the testator executed his will in the presence of two witnesses. Both were classmates of the first appellant and friends of the testator. There is a suggestion by the appellants that sufficient evidence was led before the learned judge to establish testamentary capacity. Counsel for the respondent has taken us through parts of the evidence, which, he says, throws doubt on the appellants' case. In view of the orders we propose to make in this appeal, we find it best to refrain from making any comments on the facts of this case. We find it sufficient for present purposes to deal with the learned judge's judgment on testamentary capacity.

Now, the law upon the subject of a testator's testamentary capacity, we find to be well settled. The decided cases show quite clearly that very slight testamentary capacity is required for the making of a will. The cases in which wills have been held invalid for lack of testamentary capacity involve testators who were utterly insane either upon the finding of the probate court or by reason of an order appointing a committee on the ground of insanity of the testator.

What the law requires to vitiate testamentary capacity is an insane delusion existing at the time of making of the will. This will include insanity at the time of the making or giving instructions for the making of the will. There are numerous authorities on the point. We find it quite unnecessary to deal with all of them here. We would merely refer to three.

In *Judah v. Isolyne Bose* [1945] AIR PC 174 Lord Goddard when delivering the advice of the Privy Council held that the mere fact that the testatrix was unwell when she executed her will is a long way from saying that she had no testamentary capacity.

In *Williams on Wills* (7th edn) at p. 35, the editors of this leading text upon the subject make the following statement:

> **(i) Criterion of sound disposing mind**
>
> Sound testamentary capacity means that three things must exist at one and the same time: (i) The testator must understand that he is giving his property to one or more objects of his regard; (ii) he must understand and recollect the extent of his property; (iii) he must also understand the nature and extent of the claims upon him both of those whom he is including in his will and those whom he is excluding from his will. The testator must realise that he is signing a will and his mind and will must accompany the physical act of execution. It is said that perversion of moral feelings does not constitute unsoundness of mind in this respect, but this is really a matter of degree. The criterion to be applied has been thus stated by Cockburn CJ in *Banks v. Goodfellow* LR 5 QB 549 at 565:
>
> > It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.
>
> The mere fact that the testator was eccentric or was subject to one or more delusions is not of itself sufficient. It must be shown that the delusion had, or was calculated to have, an influence on testamentary dispositions. A will has been held good subject to the deletion of a clause affected by the delusion.

Pausing for a moment, we observe that in footnote 3 at p. 36 of this text, the editors throw doubt on the correctness of the decision in *Henry Waring v. Thomas Waring* 13 ER 342, an authority cited to us by counsel for the respondent.

The second passage we cite from the same work reads as follows:

> **(ii) Presumption of sound disposing mind**
>
> It is presumed that the testator was sane at the time when he made his will but, if the question of his sanity is contested, the onus is on the person propounding the will to prove that the testator was of sound disposing mind at the time when he made his will. While there must be a vigilant examination of all the evidence, if the court feels there is no doubt substantial enough to defeat a grant of probate, the grant must be made. Complete proof of capacity or even proof beyond reasonable doubt is not essential. A will not irrational on its face, duly executed, is admitted to probate without proof of competence unless such competence is contested. The law presumes that a state of things shown to exist continues to exist unless the contrary is proved and thus a testator, when there is no suggestion of insanity, is presumed to have remained sane; and, on the other hand, if there is evidence of insanity at a time prior to the making of the will, the person propounding the will must prove competence at the relevant time.
>
> In the latter case the presumption in the first instance is against sanity especially where the will contains dispositions which are *prima facie* not such as an ordinary testator would make. Such presumption as there is, is always affected by the provisions of the will itself. If these are such as a sane person would make, and still more, if the will is drawn by the testator himself, the will can be held valid. If the dispositions are irrational, the presumption is against the will.

The third passage in the same text is at p. 39:

> **(iii) Delusions**
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> For the will to stand the testator's mind must not be dominated by an insane delusion so as to overmaster his judgment to such an extent that he is incapable of disposing of his property reasonably and properly or of taking a rational view of the matters to be considered in making a will.
>
> It cannot be said that there are people who are not suffering from delusional insanity but are incapable of making a will. A testator may be stated by medical evidence to have recovered from delusions, and yet the will be pronounced against on the ground that the onus of proof has not been discharged, even where the dispositions are probable. The court may grant probate of will and codicil with the deletion of one clause from the codicil which has been affected by a delusion. A pretended delusion assumed for the purpose of deception will not invalidate a will.

The third authority which we will refer to is *Theobald on Wills* 15th edn at p. 31 under the heading "Test of testamentary capacity":

> In order to have testamentary capacity a testator must understand:
>
> (a) the effect of his wishes being carried out at his death, though it is not necessary that he should view his will with the eye of a lawyer and comprehend its provisions in their legal form;
>
> (b) the extent of the property of which he is disposing; and
>
> (c) the nature of the claims on him. The testator must have 'a memory to recall the several persons who may be fitting objects of the testator's bounty, and an understanding to comprehend their relationship to himself and their claims upon him' so that he can decide whether or not to give each of them any part of his property by his will.
>
> The same test applies whether the testator has been subnormal from birth or has suffered impairment of the mind during his lifetime, whether through injury, physical or mental illness, senility or addiction.

The second passage from the same text is at p. 36 under the heading "suspicious circumstances":

> If a will was prepared and executed under circumstances which raise a well-grounded suspicion that the will (or some provision in it, such as the residuary gift) did not express the mind of the testator, the will (or that provision) is not admissible to probate unless that suspicion is removed by affirmative proof of the testator's knowledge and approval. A classic instance of suspicious circumstances is where the will was prepared by a person who takes a substantial benefit under it. Another instance is where a person was active in procuring the execution of the will under which he takes a substantial benefit by, for instance, suggesting the terms of the will to the testator and instructing a solicitor chosen by that person.
>
> However circumstances can only raise a suspicion of want of knowledge and approval if they are 'circumstances attending, or at least relevant to, the preparation and execution of the will itself.'

It is clear from the foregoing passages, in particular from the passages in *Theobald on Wills* that suspicious circumstances in the context of wills relate to circumstances surrounding the making of the will, **not** circumstances surrounding the testamentary capacity of the testator. In other words if the propounder of a will wishes to succeed in obtaining probate, he must upon challenge being taken establish (a) testamentary capacity and (b) dispel any suspicious circumstances surrounding the making of the will.

An illustration of the latter is to be found in the case of *Wintle v. Nye* [1959] 1 All ER 552 where the solicitor who drafted the will for a 66 year old lady and who had been her legal adviser for several years was a substantial beneficiary under that will. Another illustration is to be found in the case of *Sarat Kumari Bibi v. Rai Sakhi Chand* [1929] AIR PC 45, where the writer of the will had taken a very active part in its preparation and had obtained a substantial advantage under it.

In the present case, the learned judge addressed his mind to what he termed as suspicious circumstances relating to the testamentary capacity of the testator. That approach falls well outside both principle and authority. It is a misdirection of law. Whether the learned judge would have come to the same conclusion had he applied the correct test is something we are unable say. Whether indeed the testator in the present case had testamentary capacity upon a proper consideration of the evidence and upon a proper direction of the law by the trial judge unto himself is a question we do not think is within our realm. It will be wholly inappropriate in our judgment, for us to enter upon this issue because we have neither seen nor heard the witnesses. Indeed if we do attempt to resolve this issue we would be arrogating to ourselves powers we really do not have or if we had we ought not to exercise on the peculiar facts and circumstances of the instant case.

But that is not the end of the matter.

Mr. Joy Appukuttan in the course of his careful and well argued response to this appeal drew our attention to passages in the evidence and to documents that are highly relevant to the question whether there were suspicious circumstances surrounding the making of the will. These highly relevant facts were never considered by the learned judge. Had he done so, our task would have been made fairly simple.

Having regard to the totality of the evidence and weighing it against the misdirection by the learned judge, we consider that the order that meets the demands of the justice of the case is to direct a re-trial of the action before another court. Upon the re-trial all issues are to be at large, including the issue of testamentary capacity. This judgment, is merely to serve as a direction to the judge re-trying the case as to the correct test that is to be applied to the evidence when he comes to consider whether the testator had the requisite testamentary capacity. Nothing we have said in this judgment is to be regarded as conclusive upon the facts or evidence led before the learned judge. Those are matters to be considered afresh by the judge re-trying the case.

We would therefore allow the appeal and order the matter to be re-tried before another judge. The deposit in court is to be refunded to the appellants. We will now hear argument on costs.

After hearing argument of counsels, we hold that this is an appropriate case in which all costs should follow the event of the re-trial. We leave it to the learned judge upon the re-trial to determine whether the costs are to be borne by the successful party or by the estate.

Delivered in open court at the conclusion of arguments on 13 June 2002.